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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 254

THE COMEY MANUFACTURING COMPANY and FRED E. KATZNER, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION FOR MODIFICATION OF JUDGMENT AND PETITION FOR REHEARING

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The summary judgment below was affirmed per curiam on October 14, 1957 upon the Government's motion with Mr. Justice Harlan and Mr. Justice Whittaker dissenting. We join in the Petition for Rehearing filed by the appellants in Number 238 for the reasons therein stated.

MOTION FOR MODIFICATION OF JUDGMENT

Appellants respectfully move this Court to modify its Order affirming the Final Judgment below by excluding from said affirmance paragraph VI(C) of the said judgment on the ground that (1) the District Court had no jurisdiction to enter that injunction, and (2) said paragraph is so vague and ambiguous as to deprive the appellants of due process of law.

BRIEF IN SUPPORT OF MOTION FOR MODIFICATION

1. Even if all of the allegations of the complaint are assumed to have been established by undisputed facts, the District Court had no jurisdiction to include paragraph VI(C) in its judgment.

Paragraph VI(C) of the Final Judgment in this case prohibits each defendant from "granting to any retailer of slip covers special discounts, advertising allowances or return privileges which are not available to others on proportionately equal terms" (J.S. p. 35a). This paragraph prohibits the kind of discrimination between retailers that Congress has authorized the Federal Trade Commission to define in proceedings brought under the Robinson-Patman Act, 15 U.S.C., Sec. 13. The record in this case shows not only an absence of jurisdiction to enter this injunction but a complete absence of facts needed to give the injunction meaning.

The Complaint does not allege that the defendants failed to accord proportionately equal treatment to their retail customers.[1] In the District Court the

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[1] Paragraph 11(i)(2) of the Complaint herein, the only paragraph dealing with special discounts, etc., states:

> "Defendants Krasnov, Comfy and Katzner would injure and destroy the competition of other *manufacturers* in local areas selected by said defendants by: . . . (2) Granting special discounts, excessive advertising allowances, and abnormal return privileges to retailers *who agree to carry their merchandise exclusively;*" (emphasis ours).

Government made no claim that discrimination between retailers was a means or object of the conspiracy. The Government's counsel argued below that paragraph VI(C) should be added to the other relief because it enjoined nothing more than what was already prohibited by the Robinson-Patman Act.[2] And in fact, the "proportionately equal" test of discrimination was derived from Section 2(d) of that Act.[3] In granting this relief, the District Court erroneously assumed that practices prohibited by the Robinson-Patman Act could be enjoined in a proceeding brought under Section 4 of the Sherman Act (15 U.S.C.

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[2] Mr. Tubridy, for the Government, made the following statement about this provision in oral argument:

> "There is nothing there which is set forth which the law does not say they are not supposed to do, and the Federal Trade Commission has recently come down with a case, and that has been attached here for Your Honor's convenience, United States of America, before the Federal Trade Commission, in the matter of Henry Rosenfeld, which condemns these practices of giving these discriminatory allowances not on equal terms to all people." (R. 902)

The Rosenfeld opinion was one in which the Federal Trade Commission had charged and found specific violations of Section 2(d).

The Government's argument would have justified such additional provisions as prohibiting the transportation of stolen slip covers across state lines or the fraudulent use of the mails to sell slip covers.

[3] Section 2(d): It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. 15 U. S. C. Sec. 13(d).

Sec. 4), even though such practices were not a means or an end of the alleged Sherman Act conspiracy.

When these appellants called attention in their Jurisdictional Statement (J.S. pp. 13-16) to the unsoundness of this argument, it was abandoned here. The Government's argument here was that by this provision "the Court was prohibiting restrictive practices which were a part of the conspiracy and which, if continued, would permit the conspirators to retain the fruits of their unlawful conduct". (M.A. p. 29). In its Motion to Affirm the Government relied solely upon correspondence cited at pages 13-14 of the Motion, to support paragraph VI(C). This correspondence is characterized by the Government as evidencing an alleged purpose to use special deals, rebates, advertising allowances and exchange privileges as an inducement to exclusive dealing. The correspondence does not purport to establish the facts about any particular allowance, discount or privilege which would prove discrimination between retailers. The Government makes no claim that any of these arrangements were granted to competing retailers upon disproportionate terms.

The question which was at issue below was whether or not the defendants had used sales promotional devices to take business away from other manufacturers by inducing retailers to buy exclusively from the defendants. While the District Court did not find in its opinion that these inducements had been so used in the past it nevertheless gave drastic relief against such a use in the future by flatly prohibiting the defendants from making any agreements with retailers which excluded other manufacturers. See Paragraph

VI(D) of Judgment.[4] Instead of merely enjoining the alleged use of special concessions in order to obtain exclusive dealing agreements, the Court prohibited *all* such exclusive agreements, however induced. This was complete relief against the alleged use of special concessions and there was no practical or legal justification for the added injunction of paragraph VI(C).

Since the retailer discrimination enjoined by paragraph VI(C) was outside the issues joined by the pleadings, the District Court was completely lacking in jurisdiction to include paragraph VI(C) in its Final Judgment. Cf. Freeman on Judgments (1925 Ed.) Secs. 354 and 355, pp. 734-737; *Reynolds* v. *Stockton*, 140 U. S. 254, 265 (1891).

2. Paragraph VI(C) is so vague and ambiguous as to violate due process because no record was ever made to give it meaning.

Paragraph VI(C) places the defendants in jeopardy of a contempt citation any time they grant to any retailer a discount, an allowance or return privilege. The only standard to guide them is the test that the allowance be available to others on "proportionately equal terms." This is not, by itself, an intelligible guide to business conduct. The difficulty is that the Robinson-

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[4] Paragraph VI(D) provides that: "Defendants are jointly and severally enjoined and restrained from: . . . (D) Entering into any contract or understanding with a retailer of slip covers obligating the latter to carry exclusively slip covers manufactured by the defendant, or not to carry or deal in slip covers manufactured by others. However, this provision shall not apply to an agreement with the owner of an individual store in any city having a population (based on the last official Decennial Census) of less than 25,000 inhabitants.

Patman Act sections which refer to proportionally equal terms "purport to prescribe a standard for determining what constitutes equal treatment in the granting of merchandising payments and services, whereas actually no standard is provided. The requirement is that the payments or services must be made available to different purchases in proportion to . . . (?), and the Federal Trade Commission is left to fill in the blank."[5] No one has filled in this blank for these appellants.

Congress has in part compensated for this vagueness by providing that no defendant can be enjoined from violating the "proportionally equal" standard without a hearing before the Federal Trade Commission or a Court in which the phrase is applied to his own past transactions. In such cases, the injunction is given some meaning by the context of the specific litigation out of which it arose.

The defendants in this case, however, cannot tell from the evidence the Government introduced, which, if any of the promotional arrangements they have made with retailers in the past, are now thought to be prohibited by Section VI(C) of the judgment. The defendants have never been told which of these discounts, allowances and privileges the Government now thinks were not available to competing retailers "on proportionately equal terms".

This Court has explicitly disapproved an injunction enforcing a Robinson-Patman Act order which left for determination in contempt proceedings the task

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[5] Cyrus Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, American Law Institute (1953), p. 130.

of applying a vague standard to specific conduct. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54. This Court there said:

> "One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification."

In all of the cases to date in which a court has construed the "proportionally equal" language of Sections 2(d) and (e) of the Robinson-Patman Act specific findings of this kind have preceded any injunction.[6] Here, there is not only a complete absence of findings about competition among retailers, but a complete lack of evidence as well. Although paragraph VI(C) deals only with retailer discrimination, no retailer claimed injury from discriminatory practices in this case and there was no testimony about retailer competition.

The absence of an specification of the particular discounts, allowances and privileges granted to retailers in the past which the Government is now seeking to enjoin is especially prejudicial where, as here, the Government obtains an injunction upon a motion for summary judgment. This Court has vacated Sherman Act injunctions for vagueness where general terms have not been given a more specific meaning by

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[6] Cf. *Corn Products Co.* v. *FTC*, 324 U. S. 726, 739; *Elizabeth Arden* v. *FTC*, 156 Fed (2d) 132; *Elizabeth Arden* v. *Gus Blass*, 150 Fed. (2d) 988.

specific findings made after a full trial.[7] Thus in *Schine Chain Theaters* v. *U. S.*, 334 U. S. 110, this Court vacated an injunction against clearances "which unreasonably restrict" competition among motion picture theatres because the findings as to the unreasonable clearance evidence failed to give "a specific context to the concept of unreasonable as applied to clearance". Id. pp. 125-26. In the instant case there was not event an attempt to give a specific context to the concept of "proportionately equal" as applied to slip cover sale terms, either by evidence or by findings.

Here the appellants were subjected on summary judgment to a sweeping injunction couched in general terms and they do not have the benefit of any record which could give more specific meaning to the general terms. The appellants are the only manufacturers of any product who are criminally liable the first time they fail to interpret correctly the phrase "proportionately equal terms". They are also the only manufacturers who have ever been enjoined from violating the Robinson-Patman Act without a trial context that gives meaning to the injunction.

In addition to creating unwarranted criminal contempt liability paragraph VI(C) is an invitation to retailers to bring treble damage suits for injuries never in fact sustained. According to Section 5 of the Clayton Act (16 U. S. C. 16), paragraph VI(C)'s prohibition of unlawful discrimination against retailers may

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[7] In *Hartford-Empire Co. et al.* v. *United States*, this Court held that a injunction against antitrust violations "must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendant hereafter not 'to be under the protection of the law of the land'." 323 U. S. 406, 410.

be used as prima facie evidence that the defendants have committed such offenses. While a judicial examination of the record will show that such offenses were not litigated in this case and thus may afford a defense in the private suit, the matter should not be left for future determination. Appellants ought not to have the burden of persuading some other court that the affirmance of paragraph VI(C) was only a fortuitous result of this Court's refusal to grant plenary consideration.

The relative unimportance to this Court of the subject matter of this case, should not require that the deprivation of due process embedded in paragraph VI(C) of the judgment stand uncorrected. Upon the face of the pleadings and motion papers, there is a total lack of jurisdiction to enjoin these defendants from the prohibited conduct, and by its terms, paragraph VI(C) is so vague and indefinite as to impose an intolerable risk of contempt liability.

WHEREFORE, Appellants respectfully submit that this Court should modify its Order of Affirmance herein so as to vacate paragraph VI(C) of the judgment below.

Respectfully submitted,

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Certificate

I hereby certify that this Petition and Motion is presented in good faith and not for delay.

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